FILE COPY

FILED
OCT 8
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his guardian ad litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

Appeal from the Supreme Court of California.

BRIEF FOR APPELLEES.

FREDERIC W. HALL,
Crocker Building, San Francisco, California,
Attorney for Appellees.

JNO. U. CALKINS, JR.,
REGINALD H. LINFORTH,
HERBERT E. HALL,
EDWIN D. DICKINSON,
Crocker Building, San Francisco, California,
Of Counsel.

Subject Index

Page

Statement of the Case 1

Introduction to Argument 4

Summary Outline of Argument 6

Argument 8

I.

Appellees contend that this court has no jurisdiction of the case presented by appellants and that the appeal should be dismissed for want of a substantial federal question .. 8

1. The requirement that appellants pursue courses in military training is not a statute, but is merely a disciplinary or scholastic regulation 8

2. The state has a constitutional right in its discretion to prescribe curricula and provide for the internal regulation of its schools 9

3. The appellants, as citizens of the United States, have no privilege to attend the University of California .. 9

4. Appellants have suffered no invasion of any right of religious freedom. They are merely forbidden to continue as students unless they comply with the University's requirements 11

II.

The requirement of military training does not violate the "due process clause" of the Fourteenth Amendment 12

1. Religious freedom is not protected by the Fourteenth Amendment 13

2. Assuming that religious freedom is to be included among the "liberties" protected by the Fourteenth Amendment, it does not follow that state legislation, which may only incidentally intrude upon it, is therefore unconstitutional 14

3. There is no intrusion involved in a state's requirement of military training. But, if there were, it would be purely incidental to a proper exercise by

Page

the state of its inherent right to protect itself and to assure the security of its citizens..... 15

III.

Appellees' application of the regulation requiring military training is fully sustained by congressional authority, and abridges no privilege or immunity of a citizen of the United States. Congressional authority, however, is not requisite to appellees' enforcement of this requirement because the Reserve Officers' Training Corps is not a part of the military forces of the United States..... 19

1. An historical review of the development of the Reserve Officers' Training Corps..... 20
2. An examination of the National Defense Act..... 23
3. A study of the Morrill Act in connection with statutes establishing the Reserve Officers' Training Corps 26

IV.

Compulsory military training, as required at the University of California, violates neither the letter nor the spirit of the General Pact for the renunciation of war..... 31

1. The pact does not outlaw defensive war..... 32
2. The pact automatically releases all other contracting parties in relation to any party which violates the pact, and leaves them free to wage war on the treaty-breaking state 33

Conclusion 34

Table of Authorities Cited

Cases	Pages
Alabama and Great Southern Ry. v. U. S., 49 Ct. Cl. 522	26
Arver v. United States, 245 U. S. 366, 378, 62 L. ed. 349, 353	16, 17, 18
Atkin v. Kansas, 191 U. S. 207, 222, 223, 48 L. ed. 148, 157, 158	12, 15
Baker v. State, 200 N. C. 232, 156 S. E. 917	26
Barron v. Baltimore, 7 Peters 243	12
Bianco v. Austin, 204 App. Div. 34, 197 N. Y. S. 328	25
Coale v. Pearson, 290 U. S. 597, 78 L. ed. 221	19
Cumming v. Richmond County Board of Education, 175 U. S. 528, 545, 44 L. ed. 262, 266	11
Gilbert v. Minnesota, 254 U. S. 325, 65 L. ed. 287	14
Heim v. McCall, 239 U. S. 175, 191, 60 L. ed. 206, 216	12
King Manufacturing Co. v. City of Augusta, 277 U. S. 100, 72 L. ed. 801	9
Lundy v. Delmas, 104 Cal. 655	2
Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357	13
Oregon Ry. and Nav. Co. v. U. S., 60 Ct. Cl. 458	26
Pearson v. Coale, 167 A. (Md.) 54	19
Presser v. Illinois, 116 U. S. 252, 268, 29 L. ed. 615, 620	14
Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 395	10
State of Indiana ex rel. Clark v. Haworth, 122 Ind. 462, 7 L. R. A. 240, 242	9
State v. Johnson, 186 Wis. 1, 202 N. W. 191	25
Stephenson v. Binford, 287 U. S. 251, 275, 276, 77 L. ed. 288, 300, 301	12
Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117	13
Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97	10
U. S. v. McIntosh, 283 U. S. 605, 75 L. ed. 1302	19
U. S. v. Schwimmer, 279 U. S. 644, 73 L. ed. 889	19
Ward v. Flood, 48 Cal. 36	10, 11
Waugh v. Board of Trustees, 237 U. S. 589, 596, 59 L. ed. 1131, 1136	9, 12, 15

Codes and Statutes

	Pages
Constitution of the United States, Art. I, Sec. 8, clauses 15 and 16	24
Constitution of California, Art. IX, Sec. 9	2
Judicial Code, Section 237(a)	9
12 Stat. 503	20
39 Stat. 166	21, 25
39 Stat. 191, Sec. 40, as amended June 4th, 1920	8
41 Stat. 776, Sec. 33	8
41 Stat. 759	23
42 Stat. 625	25
43 Stat. 937	9
48 Stat. 153, Sec. 1	23
Statutes of California, 1867-68, p. 248	2
U. S. C. A., Title 10, Sec. 2	23
U. S. C. A., Title 28, Sec. 344	9
U. S. C. A., Title 32	25
46 U. S. Statutes at Large 2343	31

Textbooks and Encyclopedias

Ann. Cas. 1917B, p. 250, 251-252	26
40 Cor. Jur. 669, §17	26
Hyde, International Law, vol. II, §§586-595	33
24 Illinois Law Review 271	27, 29
47 L. R. A. (N. S.) 200	9
Moore, Digest of International Law, vol. VII, §§1089-1099	34
Privileges or Immunities Clause, Fourteenth Amendment, D. O. McGovney, 4 Iowa Law Bulletin 219	10
18 Ruling Case Law 1055	17
6 American and English Encyclopedia of Law, p. 77	11

Miscellaneous

Army Regulations 145-10, Sec. 13	8, 22

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1934

No. 55

ALBERT W. HAMILTON, a minor, by Albert Hamilton, his guardian ad litem, et al.,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Appellees.

Appeal from the Supreme Court of California.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Appellees accept the statement of the case presented by the appellants except that they desire to add thereto the following facts:

Military training at the University of California has been compulsory ever since the date of the University's organization (1868), and at all times has

been conducted in conformity with provisions of the Statutes of the United States, and with financial and other aid from the United States.

See

Appendix A,

Chronological Outline of United States Statutes, relating to military training in land grant and other colleges.

Appendix B,

Chronological Outline of Constitutional and Statutory Provisions of the State of California, relating to the University of California and military training therein.

The University of California is a land grant college and constitutes a public trust of the State of California. It is administered by the appellee, the corporation known as "The Regents of the University of California,"[1] which has full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds.

Constitution of California, Art. IX, Sec. 9; Appendix B, p. xxiii.

---

1. The Regents of the University of California was incorporated under the General Laws of the State of California, June 18th, 1868, pursuant to the provisions of Section 11 of the Organic Act, Statutes of California, 1867-68, page 248. The corporation, The Regents of the University of California, has for its members twenty-four individual Regents. These Regents are not public officers.
Constitution of the State of California, Art. IX, Sec. 9;
Lundy v. Delmas, 104 Cal. 655.

Appellees desire also to comment on the following statement set forth in appellants' statement of facts. (Paragraph immediately preceding title, "The Facts.")

> (Appellees are unable to give exact reference as they have not received a printed copy though they have a typewritten copy of appellants' brief.)
>
> "Final judgment in the Supreme Court of California went against appellants before any answer, demurrer, or other appearance had been filed on behalf of respondents, (appellees here). No pleading of any kind has been filed at any time by the said respondents or any of them. So, under the familiar rule, all of the allegations of fact in the petition for mandate in the State Court must be taken as true, and we are satisfied that counsel for appellees will agree to that statement of the law, and to the statement of fact that the allegations of the petition for writ of mandate are true."

Appellees agree that for the sake of this appeal, under the circumstances, the allegations of fact in the petition for writ of mandate must be taken as true, and they do not assert that there is any intentional misstatement of fact in the allegations of this petition. However, had appellees filed a return in the Court below certain of appellants' allegations would have been denied, and certain affirmative allegations would have been made. This statement is made only by way of avoiding possible misunderstanding in this matter which might otherwise arise upon the oral argument.

INTRODUCTION TO ARGUMENT.

At the time this appeal was allowed this Court ordered that further consideration of the question of jurisdiction of the Court be postponed until the hearing of the case on the merits. Appellees, in respect to this question, contend that the Court has no jurisdiction of the appeal. Appellees further contend that appellants' case upon the merits is insufficient to warrant the relief asked, or any relief. The major question presented concerns the constitutionality of a standing order of The Regents of the University of California that its able-bodied male students shall enroll and take courses in military science and tactics in its Department of Military Science and Tactics, which courses are presently supplied by or in connection with a unit of the Reserve Officers' Training Corps located at the University of California. Appellants contend that, as applied to include appellants, this standing order is in violation of rights secured to them by the Constitution of the United States. In support of this position appellants advance the following points:

First: That while there is no express provision in the Constitution of the United States guaranteeing freedom of religion from encroachments by the states, nevertheless, the principle of religious freedom is so deeply embedded in our fundamental concepts of justice that any invasion of it must be considered contrary to the protective provisions of the Fourteenth Amendment; that appellants' religious and moral convictions forbid them to participate in the military instruction required, and

that the requirement of attendance violates the "due process clause" of the Fourteenth Amendment.

Second: Appellants concede (in so far as this point is concerned) that the State may compel its citizens to do military service in times of peace for the State's own purposes and in the State's own organizations, but assert that they may not be forced into any branch of the Federal military forces without appropriate congressional action. Otherwise, they say, there is an intrusion upon "privileges and immunities" assured by the Fourteenth Amendment. In this connection appellants assert that the Reserve Officers' Training Corps is a part of the military forces of the United States.

Third: Appellants further contend that compulsory military training, as required of male students of the University of California, violates the spirit, if not the letter, of the Kellogg Pact of 1928.

In answering the arguments of appellants, appellees will address themselves first to certain general considerations touching upon the question of jurisdiction, and then to the several contentions of the appellants which have been outlined above, discussing each separately and under a separate heading. The discussion of these several contentions will, however, necessarily embrace matters which appellees deem applicable alike to the question of jurisdiction and to the issues of the case upon its merits.

The following is a summary outline of the argument which appellees will present:

SUMMARY OUTLINE OF ARGUMENT.

I.

Appellees contend that this Court has no jurisdiction of the case presented by appellants and that the appeal should be dismissed for want of a substantial Federal question.

1. The requirement that appellants pursue courses in military training is not a statute, but is merely a disciplinary or scholastic regulation.

2. The state has a constitutional right in its discretion to prescribe curricula and provide for the internal regulation of its schools.

3. The appellants, as citizens of the United States, have no privilege to attend the University of California.

4. Appellants have suffered no invasion of any right of religious freedom. They are merely forbidden to continue as students unless they comply with the University's requirements.

II.

The requirement of military training does not violate the "due process clause" of the Fourteenth Amendment.

1. Religious freedom is not protected by the Fourteenth Amendment.

2. Assuming that religious freedom is to be included among the "liberties" protected by the

Fourteenth Amendment, it does not follow that state legislation, which may only incidentally intrude upon it, is therefore unconstitutional.

3. There is no intrusion involved in a state's requirement of military training. But, if there were, it would be purely incidental to a proper exercise by the state of its inherent right to protect itself and to assure the security of its citizens.

III.

Appellees' application of the regulation requiring military training is fully sustained by congressional authority, and abridges no privilege or immunity of a citizen of the United States. Congressional authority, however, is not requisite to appellees' enforcement of this requirement because the Reserve Officers' Training Corps is not a part of the military forces of the United States. This is indicated by:

1. An historical review of the development of the Reserve Officers' Training Corps;

2. An examination of the National Defense Act;

3. A study of the Morrill Act in connection with statutes establishing the Reserve Officers' Training Corps.

IV.

Compulsory military training, as required at the University of California, violates neither the letter nor the spirit of the General Pact for the renunciation of war (Kellogg Pact).

1. The pact does not outlaw defensive war;

2. The pact automatically releases all other contracting parties in relation to any party which violates the pact, and leaves them free to wage war on the treaty-breaking state.

ARGUMENT.

I.

APPELLEES CONTEND THAT THIS COURT HAS NO JURISDICTION OF THE CASE PRESENTED BY APPELLANTS AND THAT THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

1. Appellees concede that the requirement that able-bodied male students of the University of California shall pursue courses of military instruction in the Department of Military Science and Tactics at the University of California, into which is incorporated a unit of the Reserve Officers' Training Corps (Act of June 3rd, 1916, 39 Statutes, 191, Sec. 40, as amended June 4th, 1920, 41 Statutes, 776, Sec. 33; Army Regulations 145-10, Sec. 13), is a regulation adopted pursuant to the authority conferred upon the appellee, The Regents of the University of California, by the Constitution of the State of California. It is said that this regulation has the force of law, but if this is true in any sense at all, it is only in the very limited sense that applies to every internal school regulation which affects the course of study or intra-school activity of the students. It does no more than prescribe a study. It is, therefore, merely a disciplinary or scholastic regulation, being but one of many incorporated in a

general plan for the government of a university in which appellants and other students have matriculated not by reason of any compulsion, but of their own choice. Appellees submit that it is not a statute within the meaning of Section 237(a) of the Judicial Code. (Act of February 13, 1925. 43 Statutes 937; U. S. C. Title 28, Section 344.)

King Manufacturing Co. v. City of Augusta, 277 U. S. 100, 72 L. ed. 801. See especially the dissenting opinion of Mr. Justice Brandeis, with whom Mr. Justice Holmes concurs, at p. 116 (L. ed. 811).

2. Appellants also argue that, as applied, (semble, through the Regents' military training requirements) the provisions of the Constitution of California relating to the University of California themselves run counter to the prohibitions of the Fourteenth Amendment of the Constitution of the United States. Appellees see no merit in this argument; moreover, if followed to its end it leads to a denial of a state's constitutional right to prescribe curricula and provide for the internal regulation of its own schools, a conclusion which finds support neither in reason nor in the authorities.

Waugh v. Board of Trustees, 237 U. S. 589, 596, 59 L. ed. 1131, 1136;

State of Indiana ex rel Clark v. Haworth, 122 Ind. 462, 7 L. R. A. 240, 242.

See also, a discussion of this question in note in 47 L. R. A. (N. S.) 200.

3. The appellants, if they may attend the University of California at all, may do so only because the

State of California extends to them that privilege. They have no privilege to attend which attaches by reason of the circumstance that they are citizens of the United States.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 395;

Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97;

Privileges or Immunities Clause, Fourteenth Amendment, D. O. McGovney, 4 Iowa Law Bulletin, 219;

Ward v. Flood, 48 Cal. 36.

In upholding the constitutionality of a statute providing for separate schools for white and colored students, and supporting as proper the act of a school principal in excluding a colored pupil offering herself at a school for white children, the Court said, Mr. Chief Justice Wallace delivering the opinion:

> "It will indeed be readily conceded that the privilege accorded to the youth of the State, by the law of the State, of attending the public schools maintained at the expense of the State, is not a privilege or immunity appertaining to a citizen of the United States as such; and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship; and it is perhaps hardly necessary to add that assuredly no person can be said to have been deprived of either life, liberty or property, because denied the right to attend as a pupil at such schools, however obviously insufficient and untenable be the ground upon which the exclusion is put."

The rule set forth in the case of *Ward v. Flood,* supra, has been expressed in numerous other cases cited in 6 *American and English Encyclopedia of Law,* page 77, where the following statement appears:

> "(5) Right of Attendance at Public Schools.—The privilege of receiving an education at the expense of the state is not one belonging to those upon whom it is conferred as citizens of the United States, and, therefore, so far as the 'privileges and immunities' clause of the Fourteenth Amendment is concerned, might be granted or refused to any individual or class at the pleasure of the state."

See, also,

Cumming v. Richmond County Board of Education, 175 U. S. 528, 545, 44 L. ed. 262, 266.

It follows that the statutes which appellants have attempted to bring into question here do not "abridge the privileges or immunities of citizens of the United States," and this clause of the Fourteenth Amendment to the Constitution of the United States therefore has no application.

4. Assuming for the sake of argument [but denying] that the right of religious freedom extends as far as appellants would carry it, still the point which appellants urge, namely, that appellants have been deprived of a "liberty" guaranteed by the clause of the Fourteenth Amendment which provides, "nor shall any state deprive any person of life, liberty, or property, without due process of law," is unsound.

The rule relative to military training at the University of California, enforced through its Regents,

does not impose any restriction whatever upon appellants, but merely forbids their continuance as students unless they comply with the University's requirements. Unless appellants have a constitutional right to attend the University no "liberty" could be abridged. But no such right exists.

Waugh v. Board of Trustees, supra;

Heim v. McCall, 239 U. S. 175, 191, 60 L. ed. 206, 216;

Atkin v. Kansas, 191 U. S. 207, 222, 223, 48 L. ed. 148, 157, 158;

Stephenson v. Binford, 287 U. S. 251, 275, 276, 77 L. ed. 288, 300, 301.

II.

THE REQUIREMENT OF MILITARY TRAINING AT THE UNIVERSITY OF CALIFORNIA DOES NOT VIOLATE THE "DUE PROCESS" CLAUSE OF THE FOURTEENTH AMENDMENT.

Briefly stated appellants' first point is this—Although the First Amendment to the United States Constitution respecting the matter of religious freedom applies only as a limitation upon Congress (*Barron v. Baltimore,* 7 Peters, 243), an act which will violate that Amendment if passed by Congress will, if passed by a state, violate the due process clause of the Fourteenth Amendment. In other words, the exact limitation which is imposed upon Congress by the First Amendment, is imposed by the due process clause of the Fourteenth Amendment upon the legislatures of the several states.

1. It has been decided that the "liberty" protected by the due process clause includes the rights of free speech and press;

Stromberg v. California, 283 U. S. 359, 75 L. ed. 1117;

Near v. Minnesota, 283 U. S. 697, 75 L. ed. 1357,

and there is some logic in an argument which carries the principle of these cases over into the matter of religious freedom.

On the other hand the propriety of this extension is by no means free from doubt. Religion would seem to be a subject which, of all others, ought to be purely the concern of the state and its own people. Difference in the racial problems of the several states alone would seem to justify this view. That it would be logical to extend the protective qualities of the Fourteenth Amendment is not enough—some sound reasons such as quite clearly underlay the decisions relating to freedom of speech and press must be found, or the principle of Federal non-interference should be maintained. To illustrate, it would seem to be logical to say that since the free speech which is guaranteed under the First Amendment against Federal restriction is guaranteed under the Fourteenth Amendment against state limitation, the right to keep and bear arms which is guaranteed by the Second Amendment is likewise a liberty not to be infringed by the states. The logic is, however, merely apparent, and will not stand the test of practical application. In 1886 this Court, without dissent, held that a contention that a statute of Illinois which forbade citizens to bear arms unless as a unit of the organized Militia deprived one

accused of violation of the statute, of "either life, liberty, or property without due process of law, is so clearly untenable as to require no discussion."

Presser v. Illinois, 116 U. S. 252, 268, 29 L. ed. 615, 620.

2. Assuming, however, for the sake of argument only, the validity of appellants' contention presently under review, still the freedom is not so absolute as to bar legislation which may incidentally intrude upon it. While this assertion of principle applies also in some degree to freedom of speech and press (*Gilbert v. Minnesota,* 254 U. S. 325, 65 L. ed. 287), it must, in practical application, have a much broader significance in the treatment of problems arising in respect of freedom of religion. The inherent characteristics of the "liberties,"—speech and press on the one hand, and religion on the other,—are so very different as to make it clear that no such definite rules restricting the scope of legislation as may be laid down in the former category can be laid down in the latter. Speaking and publishing are acts capable of exact definition —a man speaks or he does not; he publishes or refrains therefrom. The conceptions of religion, *per contra,* are so various and ever-changing as to be incapable of classification or anticipation, much less definition, and its practices are as diverse as its conceptions. It is difficult, indeed, to suppose a statute regulating human conduct in any manner whatsoever which will not interfere with some religious belief, or the exercise thereof. Obviously, therefore, in the examination of any statute to determine whether or not it violates constitutional inhibitions upon the invasion

of religious freedom, consideration must be given both to the extent of the intrusion asserted and to the substance of the religious conviction claimed invaded, and the primary purpose and justification for the enactment must be balanced against these, to the end that a reasonable conclusion may be reached.

The Courts must ever be careful to avoid assuming, by indirection, the roll of legislators upon a matter deemed necessary of regulation by the legislative branch, by declaring invalid, because of incidental intrusion upon religious liberty, statutes having major importance in relation to other human or governmental activities. The Courts have no concern with considerations of public policy.

See:

Atkin v. United States, supra, (U. S.) 222, 223, (L. ed.) 158;

Waugh v. Board of Trustees, supra, (U. S.) 596, 597, (L. ed.) 1137.

3. In the instant case the statutes under attack have for their primary purpose the requirement of certain fundamental training designed to make the student more efficient in case of emergency. This requirement has been imposed without any reference to religion; it neither compels nor forbids the entertainment or exercise of any belief; it makes no discrimination upon religious grounds; it merely requires that as a condition to attendance at the University (attendance is neither compulsory nor a matter of right) students shall pursue a prescribed course in military training. Incidentally this requirement may trench upon the

religious convictions of appellants, who are members of a sect which, appellants allege, opposes war, training for war, and military training. This is enough, they declare, to render the requirement under discussion violative of the protection afforded by the due process clause of the Fourteenth Amendment of the Constitution of the United States. This is tantamount to a declaration that it would similarly violate the First Amendment were the question one of federal rather than state legislation.

Although the necessity of engaging in military training may be inconsistent with the religious convictions of some sect, this Court has heretofore decided, where it was urged that the right of Congress to exact enforced military duty by the citizens is repugnant to a free government and in conflict with the great guarantees of the Constitution as to individual liberty, that "the premise * * * is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion."

Arver v. United States, 245 U. S. 366, 378; 62 L. ed. 349, 353.

Thus the question has received consideration from the point of view of the right of Congress to compel military service, and it has been decided that such right is not subject to, nor limited by, the religious scruples of those who are called to service. If this is true with respect to congressional authority it is equally true with respect to the authority of states. The underlying principle in both cases is the paramount necessity that a government shall have the

power to protect itself and to defend all of the liberties of all of its citizens even though when so doing it may incidentally intrude upon some of the liberties of some of its citizens.

> "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."
>
> *Arver v. United States,* supra, (U. S.) 378, (L. ed.) 353.

As a matter of history, the power of conscription has been exercised by the Federal Government only in time of war, though the states at one time or another have required military duty or training of all members of the militia (which is synonymous in this sense with male citizenry of suitable age). (18 *Ruling Case Law,* 1055.) The principles expounded in the case of *Arver v. United States,* supra, will, however, apply with equal aptness to the maintenance and training of an army in time of peace. Certainly the state may not only provide itself with soldiers in time of war, but may determine that it is expedient in time of peace that instruction in the business of war be given those who must serve in its army if war breaks out, and so may enact measures appropriate to that end. In the absence of a plainly arbitrary abuse of this right, a statutory requirement that all young men of the state take some military training, would not appear to be open to attack upon any constitutional ground. Much less may reasonable exception be taken

to statutes or regulations which, in their application, demand of those young men who seek to avail themselves of the first two years of instruction at a state university no more than attendance at drill and military study, and do not impose an obligation of any sort to take up arms in active military service.

History shows us that no matter how firmly we have from time to time resolved that there shall be no more wars, wars have come upon us, and experiences of recent years have shown us at once how cruel and dangerous it is to enter upon a war relying for the protection of the country upon the hasty conscription of untrained men.

It may be added to what has been said, that unfortunately armed forces are needed not only for wars with foreign enemies but sometimes for the preservation of domestic peace. This has been the experience of our own country and of almost every other great nation. Accordingly, it can not be argued, consistently either with our constitutional declarations and delegations of power, or with principles of common sense, that the United States, as such, or the states in severalty, can not compel military service. Indeed, appellants concede this principle, but urge that it is to be modified by the qualification that military service is not to be required of one who is religiously opposed to war or military training. Carried to its logical conclusion, this would result in a nullification of the constitutional powers of government, as clearly pointed out in *Arver v. United States,* supra.

The general considerations hereinabove advanced have been fully discussed and supported in a number of recent cases.

U. S. v. Schwimmer, 279 U. S. 644, 73 L. ed. 889;

U. S. v. McIntosh, 283 U. S. 605, 75 L. ed. 1302.

The precise point urged by appellants has been decided adversely to them, by the Supreme Court of Maryland.

Pearson v. Coale, 167 A. (Md.) 54.

An appeal to the United States Supreme Court in this case was dismissed for want of a substantial Federal question.

Coale v. Pearson, 290 U. S. 597, 78 L. ed. 221.

III.

APPELLEES' APPLICATION OF THE REGULATION REQUIRING MILITARY TRAINING IS FULLY SUSTAINED BY CONGRESSIONAL AUTHORITY, AND ABRIDGES NO PRIVILEGE OR IMMUNITY OF A CITIZEN OF THE UNITED STATES. CONGRESSIONAL AUTHORITY, HOWEVER, IS NOT REQUISITE TO APPELLEES' ENFORCEMENT OF THIS REQUIREMENT, BECAUSE THE RESERVE OFFICERS' TRAINING CORPS IS NOT A PART OF THE MILITARY FORCES OF THE UNITED STATES.

Appellants' second point is briefly a contention that the Reserve Officers' Training Corps, of which a unit exists at the University of California, is a part of the military forces of the United States, and while apparently they concede that the state may compel its citizens to do military service in times of peace for the

state's own purposes and in the state's own organizations, nevertheless they say the state may not force any citizen of the United States into the Federal military service without appropriate congressional action. To do so, they urge, is in violation of the "privileges and immunities" clause of the Fourteenth Amendment. Impliedly they assert that with respect to training in the Reserve Officers' Training Corps no appropriate congressional action has been taken.

1. As will appear from the appended summary of Federal Statutes (Appendix A), the present Reserve Officers' Training Corps is but the culmination of a plan for the establishment of military training in land grant colleges, which had its inception in 1862 and was gradually enlarged and extended until 1916, when all the several provisions which had been made from time to time were gathered into one comprehensive enactment establishing a coordinated plan. Briefly the history of this matter is as follows:

On July 2nd, 1862, President Lincoln approved an act entitled "An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanic Arts," commonly known as the "Morrill Act." [12 Stat. 503; Appendix A, page i.] This Act provided the source of funds for the support of the colleges which were expected to be created, provided that the income of these funds should be inviolably appropriated to the endowment, support, and maintenance of at least one college where the leading object should be, without excluding other scientific and classical

studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts. Further reference to this statute will be made later. In subsequent years from time to time the financial assistance thus provided was enlarged. By later statutes provision was made for the detail of officers of the regular army to act as instructors in military training in the land grant colleges, and the Secretary of War was authorized to issue such surplus articles of ordnance as might appear to him to be necessary for military instruction and practice.

In June, 1916, Congress enacted the National Defense Act (39 Statutes 166). In this Act all provisions relative to the National Defense were assembled, and as a part of the Act certain sections were adopted creating the Reserve Officers' Training Corps. By these sections the President was given authority to establish and maintain units of this corps in civil educational institutions, including the land grant colleges. Provision was made for the supply of equipment and uniforms, and the detailing of the necessary instructors. The Secretary of War was authorized to prescribe standard courses of theoretical and practical military training for the units. It was provided that no unit should be organized in a college or university unless the authorities should include in their curriculum the prescribed courses of military training, and agree to devote at least an average of three hours per week per academic year thereto. The University requires military training for only two years; to qualify for a commission in the Officers' Reserve

Corps it is, however, necessary to complete satisfactorily a four year course, the last two years of which may be undertaken by the student at his option, provided he shall have been selected for such additional training by the president of the institution and the professor of military science and tactics, and provided, further, that he shall complete satisfactorily an additional period of training at a Reserve Officers' Training Camp.

There is nothing in the Act which requires a member of the Reserve Officers' Training Corps to render military service to the United States, either in peace or in war, or to perform any military duty whatsoever save and except the requirements of study and drill. No oath of enlistment or allegiance is required. No definite period of enrollment is fixed, and continuance in the corps depends upon continuance as a student at the University.

(See Appendix A, page xiii et seq.)

Furthermore, "the control of the operation of the Reserve Officers' Training Corps units at institutions is vested in the institutional authorities. Civilian heads of institutions exercise the same general control over the Department of Military Science and Tactics that they ordinarily exercise over other departments of the institution."

Army Regulations No. 145-10, Sec. 13, War Department, Washington, May 31st, 1931.

Appellees submit that it is apparent from the history of the Reserve Officers' Training Corps that it is not a part of the military forces of the United States,

but, on the contrary, is merely a facility designed for the assistance of the several colleges which accept the benefits offered by the Federal Government.

2. Not only does the history of the Reserve Officers' Training Corps show that it is not a part of the military forces of the United States, but the fact is definitely indicated by the provisions of the National Defense Act (41 Stat. 759, 48 Stat. 153, Sec. 1; U. S. C. A., Title 10, Sec. 2), and by cases presently to be cited. The pertinent section of the Act here referred to reads as follows:

> "The Army of the United States shall consist of the Regular Army, the National Guard of the United States, the National Guard while in the service of the United States, the Officers' Reserve Corps, the organized Reserves and the enlisted Reserve Corps."

Since it could not be contended that the Reserve Officers' Training Corps is any part of the naval or marine forces of the United States, the fact that it is not named as a constituent part of the Army of the United States would seem to establish beyond question that it is no part of any of the armed forces of the United States. With reference to the parts of the Army of the United States mentioned in the statute last cited it should, perhaps, be pointed out that the Officers' Reserve Corps is separate and distinct from the Reserve Officers' Training Corps, and that the two are not to be confused. The Officers' Reserve Corps is composed of officers holding reserve commissions and who are under oath to serve at the call of the President, whereas members of the Reserve Officers' Train-

ing Corps hold no commissions, are under no oath and are not subject to any call. The Reserve Officers' Training Corps has been organized and exists only for the purpose of limited training, as distinguished from each of the parts of the Army of the United States which have for their primary purpose to serve the nation as military forces.

As a final stand, appellants may argue that although the Reserve Officers' Training Corps is not named as one of the component parts of the Army of the United States, it should, nevertheless, be so regarded because the courses of instruction which it provides are prescribed by the Secretary of War, the uniforms and equipment devoted to its use are supplied by the War Department, and the instruction is given by officers of the Army detailed for that purpose.

A complete answer to this argument is to be found in cases having to do with the status of the National Guard. The Militia (National Guard) is subject to call to execute the laws of the Union, suppress insurrections and repel invasions; it is organized, armed, and disciplined, as Congress may direct; all that is expressly reserved to the states, respectively, is the appointment of officers, and the authority of training the Militia according to the discipline prescribed by the Congress of the United States.

> Constitution of the United States, Art. I, Sec. 8, Clauses 15 and 16.

All arms, uniforms, and equipment are supplied to the National Guard by the Federal Government, which also pays the officers and men for weekly drills and an annual fifteen day encampment, and provides the

transportation, rations, ammunition, and other supplies required in connection with the latter. Beyond this it builds or otherwise secures for the National Guard housing facilities in camp areas, constructs target ranges, installs water and sewer systems, etc. The President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each state; the organization (subject to minor exceptions) is the same as that of the Regular Army; the President, in time of peace or war, may assign the National Guard of the several states to larger tactical units. Finally, the discipline (which includes training) of the National Guard must conform to the system which is or may be prescribed for the Regular Army, and the training must be carried out by the several states as provided in the National Defense Act. Instructors are detailed from among the officers and non-commissioned officers of the Regular Army.

(39 Stat. 166; 41 Stat. 759; 42 Stat. 625; U. S. C. A. Title 32.)

From the outline given above it is clear that the National Guard may much more reasonably be claimed to be a part of the military forces of the United States than may the Reserve Officers' Training Corps, yet in all cases in which the question has been raised it has been held that unless "called" or "drafted" by the President to undertake active military operations, the National Guard is not a part of the Federal military forces.

Bianco v. Austin, 204 App. Div. 34, 197 N. Y. S. 328;

State v. Johnson, 186 Wis. 1, 202 N. W. 191;

Baker v. State, 200 N. C. 232, 156 S. E. 917;
Alabama and Great Southern Ry. v. U. S., 49 Ct. Cl. 522;
Oregon Ry. and Nav. Co. v. U. S., 60 Ct. Cl. 458;
Ann. Cas. 1917 B, note, p. 250, 251-252;
40 *Cor. Jur.* 669, §17.

3. Following the enactment of the Morrill Act many land grant colleges were established to accept the benefits offered by the Federal Government. In all of these, courses of military instruction were organized as required by the specific provisions of the Act. The construction then given to the clause relating to military training by common consent, and, we believe, without a dissenting voice, was that military instruction must be compulsory for students of the several land grant colleges. In no institution, so far as is revealed by available records, was military training made an elective study until in 1923 the legislature of the State of Wisconsin provided by statute that at the University of Wisconsin it should be optional for students to take military training or to pursue their studies without that course. The Department of the Interior ruled that such action as that taken by the University of Wisconsin, so long as a course of military training was offered, met the requirements of the Morrill Act. This view was concurred in by the Attorney General in an opinion written in 1923. (36 Opinions of Attorneys General 297.) To this opinion we shall briefly refer in a later paragraph.

Appellees believe that a proper interpretation of the Morrill Act is that compulsory military training is required to be a part of the curricula of the land grant colleges. The discussion of the Act in Congress at the time it was under consideration lends great force to this contention. Furthermore, it is a matter of history that, rarely, and in most cases never, were elective courses offered at the colleges and universities of the United States at the time the Morrill Act became law. Added to this the language of the Act itself strongly supports appellees' interpretation. For confirmation of the historical facts which we have noted, and a thorough discussion of the entire matter, including a careful review of available authorities, we refer the Court to an article, "Military Training in the Land Grant Colleges; is it Optional or Mandatory?" by Professor Sveinbjorn Johnson, formerly Attorney General and later Associate Justice of the Supreme Court of North Dakota, and presently Professor of Law, and Legal Counsel for the University of Illinois.

24 Illinois Law Review, 271.

We have referred to the opinion of the Attorney General of the United States holding in effect that a land grant college which offers a proper substantial course in military tactics complies sufficiently with the requirements of the Morrill Act even though the students at that institution are not compelled to take that course. The Attorney General feels that the use of the words, "leading object," indicates that Congress must have intended to repose some discretion in

the state or in the college to determine to what extent the subjects to be taught should be offered or required. What seems, however, to be the foundation upon which his decision was based is the following argument:

> "* * * It is significant that in 1926 Congress, in amending the Act of July 2, 1862, reenacted the precise language of the Act of July 2, 1862, italicized at the outset of this opinion. The Supreme Court has held in National Lead Co. v. United States, 252 U. S. 140, 146, 147, that the reenactment of a statute while an administrative interpretation of the statute is in effect 'amounts to an implied legislative recognition and approval of the executive construction of the statute * * *; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. United States v. Bailey, 9 Pet. 238, 256.' To the same effect are United States v. Cerecedo Hermanos y Compania, 209 U. S. 337, 339; United States v. Falk & Brother, 204 U. S. 143, 149.
>
> "I am of the opinion that the construction of the statute adopted by your Department is a reasonable one, and that it was in effect approved by Congress by the reenactment of the language in question after the adoption and publication of that construction by your Department. Added force is given to the reenactment of this language by the fact that it occurred after the legislation in Wisconsin referred to above."

We think the rule stated by the Attorney General is sound, but it overlooks two pertinent historical facts, namely, that *until 1923 the accepted interpretation of*

the Act of 1862 was that it made military training compulsory;

24 Ill. Law Rev. 271; and

Notes on Federal interpretation therein contained, and particularly pages 281, 289;

and second, that the *Morrill Act as enacted in 1862 was reenacted in 1883 after twenty-one years of general acceptance of the construction favoring a compulsory requirement.* The 1926 reenactment followed only about three years of administrative rulings permitting elective courses—made *contary* to the construction earlier approved by Congress.

Appellees earnestly contend that the construction was fixed by congressional interpretation in 1883, but assuming, while denying, that for a land grant college to offer elective courses in military training is consistent with its performance of its obligations under the Morrill Act, it by no means follows that it may not make these requirements compulsory. In fact, that it may do as it deems best in this regard is the *least* that the language of the Act can mean, because it says (Sec. 4) that the subjects agriculture and mechanic arts, without excluding other scientific and classical studies, and including military tactics, shall be required, and that these branches of learning shall be taught *"in such manner as the legislatures of the states may respectively prescribe."* (Italics ours.) Appellees' contention in this respect finds full support in the opinion of the Attorney General (supra). The clause quoted, he says, suggests that it was the pur-

pose of Congress to leave to the state a wide measure of control in the administration of the statute.

Appellants argue that the circumstance that the provision of the National Defense Act which authorizes the establishment of units of the Reserve Officers' Training Corps in land grant colleges is silent upon the question of whether military training shall be compulsory or elective, while the provision which relates to establishment in other institutions expressly specifies that it may be either, evidences congressional recognition that in the former class of colleges compulsory training could not be required. Appellees, on the contrary, find in this, confirmation of their belief that military training under the Morrill Act was to be compulsory. The National Defense Act establishing the Reserve Officers' Training Corps as noted above, was enacted in 1916 when the common construction of the Morrill Act was that it made military training compulsory. The Reserve Officers' Training Corps provisions accordingly should be read in the light of that construction. We submit that the least favorable interpretation which can be given to the Reserve Officers' Training Corps statute is that it impliedly, at least, confers authority upon all land grant colleges and universities which may become beneficiaries of the Federal Government pursuant to its provisions, to establish their several departments of military science and tactics on a compulsory basis if they so desire.

Finally, appellees direct attention to the circumstance that Section 4 of the Morrill Act, which requires that military training be taught in the land

grant colleges, was reenacted without any change, so far as pertinent to the points under consideration, in 1926, ten years after the Reserve Officers' Training Corps was established. Obviously it follows that Congress has authorized the use of this corps for the accomplishment of the training which *must* be given in the land grant colleges, whether compulsory, as appellees urge, or compulsory or optional "as the legislatures of the several states may prescribe," as seems to be the present view of the Federal departments, pursuant to the Attorney General's opinion, supra.

IV.

COMPULSORY MILITARY TRAINING, AS REQUIRED AT THE UNIVERSITY OF CALIFORNIA, VIOLATES NEITHER THE LETTER NOR THE SPIRIT OF THE GENERAL PACT FOR THE RENUNCIATION OF WAR.

Under the General Pact of Paris, signed August 27, 1928 (The Kellogg Pact, 46 U. S. Statutes at Large 2343), the parties thereto "condemn recourse to war for the solution of international controversies" and "renounce it as an instrument of national policy in their relations with one another." It is further agreed that the settlement of all disputes arising among them, of whatever nature or origin, shall never be sought "except by pacific means." The substance of the treaty is expressed in two short articles, as follows:

Article 1.

> The High Contracting Parties solemnly declare in the name of their respective peoples that they condemn recourse to war for the solution of inter-

national controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

It is clear from the text that the General Pact does not purport to completely outlaw war or to make all preparations for war a violation of the Pact and hence illegal. Official interpretation of the text of the Pact as set forth in the exchange of notes which preceded signing, establishes conclusively that the treaty has a much more modest objective. (See "Notes Exchanged Between the United States and Other Powers on the Subject of a Multilateral Treaty for the Renunciation of War," Washington, Government Printing Office, 1928.) As authoritatively interpreted in these notes,

1. The Pact does not outlaw defensive war. In his note of June 23, 1928, Secretary Kellogg said: "There is nothing in the American draft of the anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty." (*Op. Cit.*, p. 33.) This was an official interpretation of the text later incorporated in the treaty, an interpretation noted and emphatically approved in the replies of other governments (see, for illustration, the reply of the French Government, *op. cit.*, p. 40; of the Italian Government, *op. cit.*, p. 42; of the Polish Government,

op. cit., p. 43; of the British Government, *op. cit.*, p. 45), and an interpretation considered essential if the text were to be made acceptable to our own and other governments.

2. The Pact automatically releases all other contracting parties in relation to any party which violates the Pact and leaves them free to wage war upon the treaty-breaking state. The preamble expressly declares that "any signatory power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits furnished by this treaty." And in Secretary Kellogg's note, quoted above, it was said: "there can be no question as a matter of law that violation of a multilateral anti-war treaty through resort to war by one party thereto would automatically release the other parties from their obligations to the treaty-breaking state." (*Op. cit.*, p. 34.) This interpretation was likewise noted and emphatically approved by other governments before the treaty was signed. (*Op. cit., passim.*)

The scope of the General Pact was limited still further by other interpretations and understandings which are set forth in the notes exchanged previous to the signing of the treaty; but it is unnecessary to refer here to these interpretations. Enough has been pointed out to make it abundantly clear that the General Pact leaves the High Contracting Parties entirely free to prepare for armed defense.

It should be noted, finally, that the General Pact deals only with war. International law recognizes other methods of armed defense which do not constitute war. (See Hyde, International Law, vol. II,

§§586-595; Moore, Digest of International Law, vol. VII, §§1089-1099.) Recourse to these methods remains unaffected by the Pact.

Clearly, therefore, it is no violation of the General Pact for the United States to prepare for armed defense, or for the state governments or any department thereof to contribute to such measures of preparation.

CONCLUSION.

Appellees respectfully submit:

That no substantial federal question is presented by the appeal in this case, and that it should be dismissed. If, however, this honorable Court shall decide that it has jurisdiction to determine the appeal upon its merits, then appellees submit that the decision of the Supreme Court of the State of California should be affirmed.

Dated, San Francisco, California,
October 5, 1934.

FREDERIC W. HALL,
Attorney for Appellees.

JNO. U. CALKINS, JR.,
REGINALD H. LINFORTH,
HERBERT E. HALL,
EDWIN D. DICKINSON,
Of Counsel.

(Appendices A and B Follow.)

Appendix A

CHRONOLOGICAL OUTLINE OF UNITED STATES STATUTES RELATING TO MILITARY TRAINING IN LAND GRANT AND OTHER COLLEGES.

The following is a chronological outline of statutes enacted by the Congress of the United States relating to military training in land grant colleges. Acts or portions of acts which have direct and important bearing on the subject are given in full. The less important acts are either summarized, or noted by titles only.

I.

ACT OF JULY 2ND, 1862, 12 STATUTES, 503.
(Morrill Act.)

An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

Sec. 1. (Summary) Grants to the several states a quantity of land equal to thirty thousand acres for each senator and representative in Congress, exclusive of mineral lands.

Sec. 2. (Summary) The land aforesaid shall be apportioned in sections or subdivisions of sections, not less than one quarter of a section, where possible to be selected from such lands within the area of each state; where there is not the quantity of public lands necessary, land scrip shall be issued to the states to the amount in acres for the deficiency of distributive shares; said scrip to be sold by the states.

Sec. 3. (Summary) Expenses of management, superintendence, and taxes from date of selection of lands shall be paid by the states to which they belong, out of the treasury of said states, to make available entire proceeds of sale to the purposes hereinafter mentioned.

Sec. 4. (Full Text) And be it further enacted, That all moneys derived from the sale of lands aforesaid by the states to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the states, upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished, (except so far as may be provided in section fifth of this Act,) and the interest of which shall be inviolably appropriated, by each state which may take and claim the benefit of this Act, to the endowment, support, and maintenance of at least one college *where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the states may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.* (Italics ours.)

Sec. 5. (Summary) The grants are made under the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several states shall be signified by legislative acts:

First. If any portion of the fund invested, as provided by Section 4 or any portion of the interest thereon shall be lost, it shall be replaced by the state to which it belongs; the annual interest shall be regularly applied in full to the purposes mentioned in the fourth section except that a sum not exceeding ten per cent upon the amount received may be expended for the purchase of lands for sites or experimental farms when authorized by the respective legislatures.

Second. No portion of said fund, nor interest, shall be applied to the purchase or maintenance of buildings.

Third. Any state which may take benefit of the Act shall provide, within five years, not less than one college, as described in Section 4, or the grant shall cease and the state shall repay or reconvey to the United States.

Fourth. An annual report shall be made regarding the progress of each college.

Fifth. Lands of a certain class shall be computed to the states at an increased price, which is fixed.

Sixth. No state in rebellion is entitled to the benefit of the Act.

Seventh. No state shall be entitled to the benefit of the Act unless it shall express its acceptance by its legislature within two years from date of approval of the Act by the President.

Sec. 6. (Summary) Scrip is not subject to location until after January 1st, 1863.

Sec. 7. (Summary) Provides for fees of land officers.

Sec. 8. (Summary) Governors of states to which scrip shall be issued must report sales annually to Congress.

II.

ACT OF APRIL 14TH, 1864, 13 STATUTES, 47. (Title only)

An Act extending the Time within which the States and Territories may accept the Grant of Lands made by the Act entitled "An Act donating public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July Second, eighteen hundred and sixty-two.

III.

ACT OF JULY 23RD, 1866, 14 STATUTES, 208. (Title only)

An Act to amend the fifth section of an Act entitled "An Act donating Public Lands to the several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July 2, 1862, so as to extend the Time within which the Provisions of said Act shall be accepted and such Colleges established.

IV.

ACT OF JULY 28TH, 1866, 14 STATUTES, 332-336.
(Revised Stat. 1225)

An Act to increase and fix the Military Peace Establishment of the United States.

Sec. 26. (only) And be it further enacted, That for the purpose of promoting knowledge of military science among the young men of the United States, the President may, upon the application of an established college or university within the United States, with sufficient capacity to educate at one time not less than one hundred and fifty male students, detail an officer of the army to act as president, superintendent, or professor of such college or university; that the number of officers so detailed shall not exceed twenty at any time, and shall be apportioned through the United States as nearly as practicable according to population, and shall be governed by general rules, to be prescribed from time to time by the President. Cf. XXV, XXVI (Sec. 40b) infra.

V.

ACT OF JUNE 8TH, 1868, 15 STATUTES, 67, 68.
(Title only)

An Act to further provide for giving Effect to the various Grants of public lands to the State of Nevada.

(Under Act of July 2nd, 1862.) See I supra.

VI.

ACT OF MAY 4TH, 1870, 16 STATUTES, 373. (Full Text)

Joint Resolution authorizing the Supply of Arms, for Instruction and Practice, to certain Colleges and Universities.

Be it resolved by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That the Secretary of War be authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of any small-arms or pieces of field artillery belonging to the government and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university, under the provisions of section twenty-six of the "Act to increase and fix the military peace establishment of the United States"; the Secretary to require a bond in each case, in double the value of the property, for the care and safe-keeping thereof, and for the return of the same when required. Cf. XXV, XXVI (Sec. 47) infra.

VII.

ACT OF MARCH 3RD, 1871, 16 STATUTES, 581.

(Summary) Enlarges rights of selection given under Act of June 8th, 1868. See V supra.

VIII.

ACT OF JANUARY 23RD, 1873, 17 STATUTES, 416.

(Summary) Extends time within which states may accept benefits of Act of July 2nd, 1862. See I supra.

IX.

ACT OF JULY 5TH, 1876, 19 STATUTES, 74.

(Summary) Increases the number of officers which may be detailed to land grant colleges from twenty to thirty. See IV supra.

X.

ACT OF MAY 4TH, 1880, 21 STATUTES, 110-113.

(Summary) Provides that upon application of any college, university, or institution of learning incorporated under the laws of any state within the United States, having capacity at the same time to educate not less than one hundred and fifty male students, the President may detail an officer of the Army on the retired list to act as president, superintendent, or professor thereof.

XI.

ACT OF MARCH 3RD, 1883, 22 STATUTES, 484.

(Summary) Enlarges the field of investments authorized by Section 4 of the Act of July 2nd, 1862. See I supra.

XII.

ACT OF MARCH 2ND, 1887, 24 STATUTES, 440.

(Title only)

An Act to establish agricultural experiment stations in connection with the colleges established in the several states under the provisions of an Act approved July second, eighteen hundred and sixty-two, and of the Acts supplementary thereto.

XIII.

ACT OF SEPTEMBER 26TH, 1888, 25 STATUTES, 491.

(Summary) Increases the number of officers of the Army which may be detailed to act as instructors to fifty. See IV supra.

Also authorizes the Secretary of War, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government and which can be spared for that purpose, such number as may appear to be required for military instruction and practice by students of colleges or universities given military instruction under Acts of Congress. See VI supra.

XIV.

ACT OF AUGUST 30TH, 1890, 26 STATUTES, 417.

(Summary) Makes additional appropriations to colleges established in accordance with an Act of Congress approved July 2nd, 1862. See I supra.

XV.

ACT OF JANUARY 13TH, 1891, 26 STATUTES, 716.

(Summary) Increases number of officers of Army which may be detailed as instructors to colleges to seventy-five, provided that no officer shall be detailed to any educational institution where instruction and drill in military tactics is not given. See IV supra.

XVI.

ACT OF NOVEMBER 3RD, 1893, 28 STATUTES, 7.

(Summary) Increases number of officers of Army who may be detailed as instructors, fixing term of duty. See IV supra.

XVII.

ACT OF AUGUST 6TH, 1894, 28 STATUTES, 233-235.

(Summary) Appropriation Act, with administrative instruction as to application of funds, specifically providing against cutting down detail of officers to colleges. See IV supra.

XVIII.

ACT OF MAY 17TH, 1900, 31 STATUTES, 179. (Title)

An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose.

(Contains protective clause insuring payment of funds for support of colleges under Act of July 2nd, 1862. See I supra.)

XIX.

ACT OF FEBRUARY 26TH, 1901, 31 STATUTES, 810.

(Summary) Provides for the detail of retired officers in addition to active officers authorized by Act of July 28th, 1866. See IV supra.

XX.

ACT OF JUNE 17TH, 1902, 32 STATUTES, 388. (Title)

An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

(Contains clause assuring that the United States will make up for any deficiency resulting from the

Act in the sum necessary for the support of colleges organized under the Act of July 2nd, 1862. See I supra.)

XXI.

ACT OF APRIL 21ST, 1904, 33 STATUTES, 225.

(Summary) Makes additional provision for detailing officers and non-commissioned officers (retired) as in the judgment of the President may be required to act as instructors of military drill and tactics in schools in the United States and Territories where such instructions are authorized by the educational authorities and where such services have been applied for by said authorities. Also contains provision for the issuance of ordnance. See IV, VI supra.

XXII.

ACT OF MARCH 4TH, 1907, 34 STATUTES, 1256, 1281.

(Summary) Provides additional funds for land grant colleges. See I supra.

XXIII.

ACT OF MARCH 3RD, 1909, 35 STATUTES, 732, 738.

(Summary) Last paragraph makes provision for improvement in pay conditions of retired officers detailed as instructors to military departments of land grant colleges.

XXIV.

ACT OF JULY 17TH, 1914, 38 STATUTES, 512.

(Summary) Permits the purchase under regulations to be established by the Secretary of War, by

educational institutions to which an officer of the Army is detailed as professor of military science and tactics, for cash, for use of military students, stores, supplies, material of war, and military publications. Cf. XXV, XXVI, infra.

XXV.

ACT OF JUNE 3RD, 1916, 39 STATUTES, 166, 191.

An Act for making further and more effectual provision for the national defense, and for other purposes.

(Summary) This Act is popularly known as the "National Defense Act of 1916." It designated the organizations which should make up the Army of the United States, and contained general provisions covering the Regular Army, National Guard, Officers' Reserve Corps, Citizens' Military Training Camps, and the Reserve Officers' Training Corps. The latter subject was covered by Sections 40 to 53, inclusive, all of which, except Section 46, have been substantially amended. See XXVI infra.

By Section 40 the President was authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps to consist of a senior division organized at universities and colleges requiring four years of collegiate study for a degree, including state universities and those state institutions "that are required to provide instruction in military tactics under the provisions of the Act of Congress of July second, eighteen hundred and sixty-two (see I supra), donating lands for the establishment of col-

leges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics."

Section 41 provided that no unit should be established until an officer of the Army should be detailed as Professor of Military Science and Tactics, nor until such institution should maintain, under military instruction, at least one hundred physically fit male students.

Section 43 authorized the Secretary of War to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and provided that no unit of the senior (university) division should be organized at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training, or to devote an average of at least three hours per week per academic year to such military training.

In the following sections additional provision was made for the detail of officers and non-commissioned officer instructors, for the issuance of arms, uniforms, and equipment; also for special benefits by way of commutation of subsistence to members of the Reserve Officers' Training Corps volunteering to take an advanced course of not less than two years duration.

XXVI.

ACT OF JUNE 4TH, 1920, 41 STATUTES, 759, 766.

An Act to amend an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice.

(Summary) This Act made certain amendments to the National Defense Act (see XXV supra), and included amendments to provisions relating to the Reserve Officers' Training Corps. The full text of these amendments constitutes the law as it stands presently, with one minor exception.

Sec. 33. That said Act be, and the same is hereby, amended by striking out sections 40, 41, 42, 43, 45, and 46, and inserting the following in lieu thereof:

"Sec. 40. Reserve Officers' Training Corps—Organization.—The President is hereby authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps, one or more units in number, which shall consist of a senior division organized at universities and colleges granting degrees, including State universities and those State institutions that are required to provide instruction in military tactics under the Act of Congress of July 2, 1862, donating lands for the establishment of colleges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics, and at those essentially military schools not conferring academic degrees, specially designated by the Secretary of War as qualified, and a junior division organized at all other public

and private educational institutions, and each division shall consist of units of the several arms, corps, or services in such number and such strength as the President may prescribe: Provided, That no such unit shall be established or maintained at any institution until an officer of the Regular Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students, except that in the case of units other than infantry, cavalry, or artillery, the minimum number shall be fifty: Provided further, That except at State institutions described in this section, no unit shall be established or maintained in an educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War.

"Sec. 40a. Reserve Officers' Training Corps Courses.—The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of such corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training, except as provided in section 47c of this Act.

"Sec. 40b. Personnel for Duty with Reserve Officers' Training Corps.—The President is hereby authorized to detail such numbers of officers, warrant officers, and enlisted men of the Regular Army, either active or retired, as may be necessary for duty as professors of military science and tactics, assistant professors of military science and tactics, and military instructors at educational institutions where one or more units of the Reserve Officers' Training Corps are maintained. In time of peace retired officers, retired warrant officers, or retired enlisted men shall not be detailed under the provisions of this section without their consent, and no officer on the active list shall be detailed for recruiting service or for duty at a school or college, not including schools of the service, where officers on the retired list can be secured who are competent for such duty. Hereafter retired officers below the grade of brigadier general and retired warrant officers and enlisted men shall, when on active duty, receive full pay and allowances."

Sec. 34. That said Act be, and the same is hereby, amended by striking out sections 47, 48, 49, 50, 51, 52, 53, and 54 and inserting the following in lieu thereof:

"Sec. 47. Supplies for Reserve Officers' Training Corps.—The Secretary of War, under such regulations as he may prescribe, is hereby authorized to issue to institutions at which one or more units of the Reserve Officers' Training Corps are maintained such public animals, transportation, arms, ammunition, supplies, tentage, equipment, and uniforms, belonging to the United States as he may deem necessary, and to forage at the expense of the United States public animals

so issued, to pay commutation in lieu of uniforms at a rate to be fixed annually by the Secretary of War, and to authorize such expenditures from proper Army appropriations as he may deem necessary for the efficient maintenance of the Reserve Officers' Training Corps. He shall require from each institution to which property of the United States is issued a bond in the value of the property issued for the care and safe-keeping thereof, except for uniforms, expendable articles, and supplies expended in operation, maintenance, and instruction, and for its return when required.

"Sec. 47a. Reserve Officers' Training Corps Camps.—The Secretary of War is authorized to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps * * * to transport members of such corps to and from such camps at the expense of the United States so far as appropriations will permit, to subsist them at the expense of the United States while traveling to and from such camps and while remaining therein so far as appropriations will permit, or in lieu of transporting them to and from such camps and subsisting them while en route, to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same, and to admission to military hospitals at such camps, and to furnish medical attendance and supplies; to use the troops of the

Regular Army, and such Government property as he may deem necessary, for the military training of the members of such corps while in attendance at such camps; and to prescribe regulations for the government of such camps.

"Sec. 47b. (Title only) Appointment of Graduates of Reserve Officers' Training Corps as Reserve Officers.

"Sec. 47c. Pay and Commutation of Subsistence, Reserve Officers' Training Corps. (Excerpt and summary) When any member of the senior division of the Reserve Officers' Training Corps has completed two academic years of service in that division, and has been selected for advanced training by the president of the institution and by the professor of military science and tactics, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, devoting five hours per week to the military training prescribed by the Secretary of War, and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished at the expense of the United States commutation of subsistence at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: * * *"

There follow provisions relating especially to Medical, Dental, or Veterinary training units.

XXVII.

ACT OF APRIL 13TH, 1926, 44 STATUTES, 247.

(Summary) This is a re-enactment of the Act of July 2nd, 1862 ("Morrill Act," see I supra) amending Section 4 thereof to enlarge the field open for the investment of funds, which concluded, as did the original Act, with the following language:

> "Provided, That the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section 5 of this Act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this Act, to the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

XXVIII.

ACT OF MAY 12TH, 1928, 45 STATUTES, 501.

(Summary) Provides that nothing in the National Defense Act of 1916 (see XXV supra) shall be construed to require that advance training in the Reserve Officers' Training Corps follow without interruption upon the completion of the two years' basic, elective,

or compulsory course of military training prescribed for colleges in which units of the Reserve Officers' Training Corps are located.

Of necessity, there have been omitted from the foregoing Summary some sections which have bearing on the matter of military training in land grant and other colleges. It is believed, however, that nothing contributing substantially to an understanding of the development and general plan of the Federal contribution to military instruction in these colleges, or in anywise pertinent to the matters before the Court, has been omitted. It is believed also that the Summary contains citations to all relevant Acts.

Appendix B

CHRONOLOGICAL OUTLINE OF CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE STATE OF CALIFORNIA RELATING TO THE UNIVERSITY OF CALIFORNIA AND MILITARY TRAINING THEREIN.

I.

STATUTES OF CALIFORNIA 1867-1868, page 248,
Approved March 23rd, 1868.

An Act to create and organize the University of California. (Commonly called "The Organic Act.")

(Summary) This act creates a state university to be known as the "University of California," provides for its government and management, and creates a Board of Regents charged with the general government and superintendence of the University. "The Regents * * * shall have power, and it shall be their duty, to enact laws for the government of the University, * * * and to determine the moral and educational qualification of applicants for admission * * *" (Sec. 13.)

Any resident of California of the age of fourteen years or upwards, of approved moral character, is given the right to enter himself in the University on such terms as The Regents may prescribe. (Sec. 3.)

Military training is made compulsory for all able-bodied male students by specific provision of the Act. (Sec. 6.) The language of this requirement is as follows:

"in order to fulfil the requirements of the said Act of Congress, (Act of July 2nd, 1862, "Morrill Act" 12 Stat. 503) all able bodied male students of the University, whether pursuing full or partial courses in any college, or as students at large, shall receive instruction and discipline in military tactics in such manner and to such extent as the Regents shall prescribe, * * *"

II.

STATUTES 1869-70, page 119, Approved March 4th, 1870.

An Act to provide military instruction in the University of California, and to authorize the Governor to call into service the retired officers of university cadets in cases of war or insurrection.

Section 1. (Full text) The students of the State University of California shall, as soon as practicable, be organized into a body, to be known as the "University Cadets," for the purpose of physical training and military drill and instruction.

Sec. 2. (Excerpt) The officers of said Cadets, * * * shall be appointed by the Faculty, on a competitive examination, * * * and they shall be commissioned by the Governor of the State.

Sec. 3. (Excerpt) The Adjutant-General of the State shall issue such arms, munitions and equipments * * * as the Board of Regents may require.

Sec. 4. (Excerpt) Upon graduating or retiring from the University, such officers may resign their commissions, or hold the same as retired officers of

the University Cadets, liable to be called into service by the Governor in case of war, invasion, insurrection or rebellion. * * *.

Sec. 5. (Excerpt) The Board of Regents shall make such further regulations as they shall deem proper and consistent with the Constitution and laws of this State.

Sec. 6. (Full text) It is not the intent of this law to lessen, encroach upon or retard the academic and scientific courses provided for in said University, but to secure a system of physical training, with habits of order and discipline, in aid of mental and moral advancement.

III.

An Act to establish a political code, approved March 12th, 1872.

(Summary) This Code provided in general for the political administration of the State of California, and included many sections relating to the University of California. (Sec. 1385, 1477 inclusive.)

Section 18 of the Code contained an express proviso that all statutes, laws and rules in force in the state prior to the adoption of the Code, whether consistent or not with the provisions of the Code, unless expressly continued in force by it, are repealed and abrogated.

(Note: Undoubtedly this had the effect of repealing the two statutes above noted; however, see IV infra.)

The sections of the Political Code relating to the University in effect included all of the provisions of the Act of March 23rd, 1868 (The Organic Act) and of the Act of March 4th, 1870 (University Cadet Act). (See I and II supra.) There were some minor departures, but substantially the provisions relative to admission, government, and military training remained unchanged. These sections have never been repealed specifically, though undoubtedly where in conflict with constitutional provisions (see IV and V infra) they are superseded. No legislation or constitutional enactment has altered or otherwise affected the provisions relating to the "University Cadets."

IV.

The Constitution of the State of California, 1879, ratified by a vote of the people May 7th, 1879.

This Constitution not only provided the outline of fundamental law such as is contained in the Constitution of the United States, but contained as well many detailed provisions relative to government, including sections regulatory of state institutions, education, and the like.

Article IX, Section 9 has specific reference to the University of California, and, as will be seen, reenacted the Organic Act of March 23rd, 1868 and amendatory acts, which had been repealed by the Political Code. (See III, also I and II supra.) The full text of this section as adopted in 1879 follows:

"Sec. 9. The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and the proper investment and security of its funds. It shall be entirely independent of all political or sectarian influence, and kept free therefrom in the appointment of its regents, and in the administration of its affairs; provided, that all the moneys derived from the sale of the public lands donated to this state by act of congress, approved July second, eighteen hundred and sixty-two (and the several acts amendatory thereof) shall be invested as provided by said acts of congress, and the interest of said moneys shall be inviolably appropriated to the endowment, support, and maintenance of at least one college of agriculture, where the *leading objects shall be (without excluding other scientific and classical studies, and including military tactics),* to teach such branches of learning as are related to scientific and practical agriculture and the mechanic arts, in accordance with the requirements and conditions of said acts of congress; and the legislature shall provide that if, through neglect, misappropriation, or any other contingency, any portion of the funds so set apart shall be diminished or lost, the state shall replace such portion so lost or misappropriated, so that the principal thereof shall remain forever undiminished. No person shall be debarred ad-

mission to any of the collegiate departments of the University on account of sex." (Italics ours.)

V.

The Constitution of California, Article IX, Section 9 (amended 1918).

This section was amended November 5th, 1918. The principal change made was in the first clause, which was altered to read as follows:

> "The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds."

Otherwise the section is little altered. Reference to the Act of March 23rd, 1878 (The Organic Act) is omitted. Certain specific powers are conferred upon The Regents, in addition to the general power of government; the provision as to military training remains as in the original section.